No. 07-122

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In The

Supreme Court of the United States

JEFFREY A. GRUSENMEYER & ASSOCIATES, INC.,

Petitioner,

v.

DAVISON SMITH & CERTO ARCHITECTS, INC., WILLIAM R. DAVISON, RANDALL S. SMITH, JEFFREY M. CERTO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant the Petition so that this Court can review the Sixth Circuit's unpublished Opinion affirming the District Court's summary judgment in favor of Respondents, where the Petition fails to establish that the Sixth Circuit's ruling is in conflict with a decision of another Court of Appeals or implicates an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULES 29.6 AND 14.1(b)

There are no parties to the proceedings other than those listed in the caption.

Respondent Davison Smith & Certo Architects, Inc. is a privately held Ohio professional corporation that has no parent corporation and no publicly held company owns 10% or more of its stock.

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BRIEF OF RESPONDENTS IN OPPOSITION

INTRODUCTION

This case arises out of a dispute between two competing architectural firms involving the use of "existing site and building conditions" drawings prepared as part of a capital improvements program for an all-girls private high school located in a suburb of Cleveland. (Pet. App. at 16a). The case was litigated in the United States District Court for the Northern District of Ohio which ultimately entered summary judgment in favor of the defendants. An appeal was filed from that judgment to the United States Court of Appeals for the Sixth Circuit which affirmed the District Court in an unreported per curiam Opinion. Petitioner has filed a petition with this Court seeking a writ of *certiorari* to the United States Court of Appeals for the Sixth Circuit. However, Petitioner has failed to present any "compelling reasons" for the Court to grant this Petition for a Writ of *Certiorari*. See, Sup. Ct. R. 10.

Specifically, Petitioner fails to demonstrate that the Sixth Circuit's January 8, 2007 unpublished per curiam Opinion is in conflict with the decision of another United States court of appeals on the same issue or that the Sixth Circuit decided an important federal question that is yet unsettled in this Court. See, Sup. Ct. R. 10(a) and 10(c). In fact, Petitioner has advanced propositions of law that were never addressed or resolved by the Sixth Circuit. Despite these efforts, Petitioner has failed to establish that

the Sixth Circuit's Opinion was erroneously decided or misapplied an established rule of law, even though *certiorari* is "rarely granted" even when such grounds have been demonstrated. See, Sup. Ct. R. 10.

Therefore, the Petition should be denied.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY THE COURTS BELOW

The list of citations set forth at page 1 of the Petition is correct.

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The jurisdictional statement appearing at page 1 of the Petition is correct.

COUNTER-STATEMENT OF THE CASE

A. Grusenmeyer Contracts with Magnificat High School to Prepare Existing Conditions Drawings.

The dispute in this case centers principally around existing conditions drawings that were prepared by Petitioner, Jeffrey A. Grusenmeyer & Associates, Inc. ("Grusenmeyer" or "Petitioner") in 1999

for Magnificat High School ("Magnificat"), a private, all-girls Catholic high school located in Rocky River, Ohio, a suburb on the westside of Cleveland. At the time, Magnificat was contemplating a capital improvements program that would include the construction of a new fine arts/band/auditorium building on its suburban campus.

So, in the Spring of 1999, Magnificat sent out a Request for Proposal for a Master Plan Project and received responses from four or five architects. Grusenmeyer and Respondent Davison Smith & Certo Architects, Inc. ("DS&C") were two of the architectural firms that submitted responsive proposals.

Approximately two months after submission of the bids, Grusenmeyer was awarded the Master Plan Project. On or about June 2, 1999, Grusenmeyer prepared a two-page letter agreement and forwarded it to Magnificat's president, Sister Carolyn Marshall, to sign. (Pet. App. at 6a-7a). Grusenmeyer was to be paid approximately $15,000 for its services, with the first $2,000 provided on a donated basis. (Pet. App. at 7a). While the contract further provided that the services would be in accordance with AIA document B151, Abbreviated Form of Agreement Between Owner and Architect, 1987 Edition, Articles 3 through 10, and the American Institute of Architect's Code of Ethics, Grusenmeyer never provided Magnificat with either the "Code of Ethics" or the Abbreviated Form Agreement. (Pet. App. at 11a).

The written letter agreement provided that Grusenmeyer was engaged to:

> 1. Review of the existing facilities' conditions including architectural, mechanical, electrical, structural and plumbing work; making such recommendations as are appropriate regarding maintenance and improvement of the facilities;
>
> 2. Review and develop a program for capital improvements including the areas discussed during the site visit of April 23, 1999 (Parking Institutional Advancement Group offices, State Aid Instructional Spaces, and Fine Arts/Band Practice/Auditorium type spaces) as well as other areas that may be developed during the planning process; and
>
> 3. Provide a master plan for the implementation of the capital improvements program, including plans, renderings and perspectives suitable for use in the presentation and future reference during master plan implementation.

(Pet. App. at 7a).

B. Grusenmeyer's Creation of Master Plan, Which Included Drawings of Existing Conditions.

Pursuant to this contract, one of Grusenmeyer's obligations in developing the Master Plan was to prepare a plan of existing conditions at Magnificat.

(Pet. App. at 7a). In order to create the plan of existing conditions, Grusenmeyer obtained certain basic information – namely lot lines, house locations and street information – from its own civil consultant. The civil consultant obtained much of this information from public records available from the Cuyahoga County Recorder's Office. Grusenmeyer also took field measurements of the existing interior work (buildings) and utilized existing drawings (5 to 7 sets) of the buildings that were in the possession of Magnificat to complete his drawings of the existing structures. Some of the existing drawings that were utilized by Grusenmeyer had actually been prepared by DS&C in connection with earlier renovations and additions to the school.[1] During a discovery deposition, Grusenmeyer principal Jeffrey Grusenmeyer testified that "if there was information we felt useful, we used it."

Grusenmeyer completed the Master Plan and drawings in approximately September 1999. Once Magnificat received the Master Plan, it was disseminated to Sister Carolyn Marshall, its principal, and to a member of its plant committee, and possibly others. Sister Carolyn Marshall testified that Magnificat was of the belief that there were no limitations upon its

[1] While Grusenmeyer previously had not performed any architectural services for Magnificat, DS&C had been engaged to renovate the school's convent building into school and classroom space, designed a gymnasium addition and remodeled the science labs.

use of the drawings it received from Grusenmeyer in the future implementation of the capital improvements program, of which the Master Plan was a part. After all, Magnificat had paid Grusenmeyer to create the Master Plan and existing conditions drawings for its use. This understanding was, as the District Court aptly noted, "consistent with logic." (Pet. App. at 27a).

In addition to the drawings, Grusenmeyer also provided an AutoCAD file containing only the existing conditions drawings to Mr. Don Koma, Magnificat's facility director. (Pet. App. at 7a-8a).

C. Magnificat's Second RFP and Contract with DS&C.

Magnificat sent out a second Request for Proposal to eleven companies regarding the design and construction of a performing arts center. Both Grusenmeyer and DS&C submitted proposals. (Pet. App. at 8a). After extensively interviewing seven of the companies, DS&C was judged to be the best firm to handle the project and the project was awarded accordingly. (Pet. App. at 8a). On December 4, 2002, the contract with DS&C for the design of Magnificat's performing arts center was executed.

After DS&C was awarded the contract, Magnificat provided a disk containing the existing conditions drawings to DS&C. (Pet. App. at 8a). It was Sr. Marshall's belief and understanding that the architects needed the drawings of the existing buildings to facilitate their work. (Pet. App. at 8a). The disk

provided to DS&C did not have any of Grusenmeyer's original ideas; it was all existing conditions. DS&C has admitted only that it received a disk from Magnificat that exclusively contained existing conditions. After receiving that disk, in order to fulfill its contractual obligations, DS&C confirmed and then utilized, if confirmed, the drawings of the existing conditions, took its own field measurements, utilized its own paper drawings for additions it had done to the buildings in the past and the drawings of other architects relating to other work in order to create its drawings for the performing arts center. All of this was done as part of the protocol of the industry. (Pet. App. at 9a). It was DS&C's belief that Magnificat paid Grusenmeyer for the work and would not have provided DS&C with the disk unless they could utilize it.

D. Legal Proceedings Below.

On December 1, 2004, Grusenmeyer initiated this case by filing a Complaint, later amended with leave of court, in the United States District Court for the Northern District of Ohio. In its pleadings, Grusenmeyer sought damages and injunctive relief for alleged copyright infringement. Grusenmeyer's claims were made against DS&C and Respondents William R. Davison, Randall S. Smith and Jeffrey M. Certo.[2]

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[2] Unless the context requires otherwise, these individual Respondents shall be designated jointly throughout this brief as DS&C.

On January 25, 2006, the District Court entered its final judgment in the form of a Memorandum Opinion and Order granting summary judgment in favor of DS&C and denying Grusenmeyer's cross-motion. (Pet. App. at 15a-30a). In doing so, the District Court stated that "[a]fter a thorough review of the relevant law, and the arguments and evidence set forth by the parties as to this issue, the Court finds that the drawings do not constitute copyrightable expression." (Pet. App. at 23a). Additionally, even if the existing conditions drawings were deemed copyrightable, the District Court found that the unambiguous terms of the written contract between Magnificat and Grusenmeyer and the compensation paid to Grusenmeyer by Magnificat allowed DS&C's use of the existing conditions drawings in connection with the development of the performing arts building. (Pet. App. at 26a-27a).

In Grusenmeyer's appeal to the United States Court of Appeals for the Sixth Circuit, the District Court's judgment was unanimously affirmed. (Pet. App. at 5a-14a). Because the Sixth Circuit agreed with the District Court's determination that the contract between Grusenmeyer and Magnificat permitted DS&C to use the existing conditions drawings, the Sixth Circuit found it "unnecessary to address the other issues raised on appeal, including the suitability of the drawings for copyright protection and the applicability of the fair use doctrine." (Pet. App. at 14a). Upon Grusenmeyer's petition for

rehearing en banc, the petition was denied. (Pet. App. at 3a-4a).

Thus, DS&C was entitled to summary judgment in its favor as no genuine issues as to any material facts were found and, as the District Court properly determined, DS&C was and is entitled to judgment as a matter of law. Based upon the District Court's thorough and well-reasoned decision, that judgment was appropriately affirmed by the Sixth Circuit.

REASONS FOR DENYING THE PETITION

The Petition satisfies none of the criteria for a grant of *certiorari*. Petitioner has pointed to no genuine conflict created by the Sixth Circuit's opinion here and any decision of another court of appeals or this Court's precedent. Instead, Petitioner accuses the Sixth Circuit of having "exhibited an antipathy toward recognizing copyrights for technical drawings," and for imposing a "categorical rule" that jeopardizes "uniform application" of the copyright laws. (Pet. at 4, 11). Yet, there is absolutely no indication that the Sixth Circuit's opinion even addressed the question whether Grusenmeyer's drawings were suitable for copyright protection. The issues raised in the Petition are artificial, entirely specious and concocted solely to make it seem as though the case warrants discretionary review by this Court.

Moreover, even if there *were* a circuit conflict on copyrightability of the architectural drawings here,

that conflict would not justify a grant of *certiorari* in this case because resolution of the conflict would not alter the Sixth Circuit's affirmance of the District Court's summary judgment on the dispositive contract issue.

Based upon a considered assessment of the record and the arguments made by Petitioner, all indications are that the Sixth Circuit considered and decided the one dispositive issue raised in this appeal, first at the merit stage (Pet App. at 5a-14a), and then upon Petitioner's request for rehearing en banc pursuant to Fed. R. App. P. 35. (Pet. App. at 3a-4a).

For any number of reasons, a decision by this Court would have little or no effect. It would be a waste of private and judicial resources to debate the copyrightability of these particular architectural drawings – particularly because the Sixth Circuit never passed on the issue – and/or the legal interpretation of the particular contract in this fact-specific context. The Sixth Circuit's decision is consistent with the law in other circuits and its decision is plainly correct.

In short, Petitioner has presented no reason why the Court should grant *certiorari*. The Petition should be denied.

I. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT OR THE LAW IN ANY OTHER CIRCUIT.

A. The Sixth Circuit Did Not Announce a "Categorical Rule" of Law Denying Copyright Protection in Regard to Architectural Drawings of Existing Conditions.

The petition in this case is premised on the erroneous assumption that "the Sixth Circuit has exhibited an antipathy toward recognizing copyrights for technical drawings * * * ." (Pet. at 4). According to Petitioner, "[t]he Sixth Circuit's affirmance of the district court's reliance in this case on the version of *Sparaco* as cited in *ATC*, further established the circuit's *categorical rule* denying copyright protection to architectural drawings of existing conditions." (Pet. at 5-6) (emphasis added). But there is no holding by the Sixth Circuit – or the District Court for that matter – adopting a "categorical rule" on this precise issue.

1. To begin with, the Sixth Circuit did not simply remain silent and thereby impliedly consent to all aspects of the District Court's rationale for granting summary judgment to DS&C, as Petitioner would have it. (Pet. at 5 n. 2). Rather, far from articulating a "categorical rule" on the copyrightability of the existing conditions drawings at issue here, the Sixth Circuit's affirmance was expressly restricted to the conclusion that "the district court correctly determined

that the defendants' use was permitted by contract * * * ." (Pet. App. at 6a). Given the disposition of the fact-specific contract issue, the Sixth Circuit found it "unnecessary to address the other issues raised on appeal, including the suitability of the drawings for copyright protection * * * ." (Pet. App. at 14a).

The case relied upon by Petitioner to support the argument that the Sixth Circuit's opinion means something more than it actually says on the issue of whether Grusenmeyer's drawings were entitled to copyright protection, *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), does not lead to the conclusion being advanced in the Petition. The order being examined by this Court in *Ylst* presented difficulty because it was an "unexplained order," in connection with a habeas proceeding, which was clarified to "mean an order whose text or accompanying opinion does not disclose the reason for the judgment." Id. at 802. This Court's concern was triggered because "sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent." Id. Here, the Sixth Circuit's affirmance of the District Court cannot be said to be such an "unexplained order" and the maxim in the Petition has no application.

It is unmistakably evident from the Sixth Circuit's opinion that its ruling rested on the particular facts and legal construction of the Grusenmeyer-Magnificat contract in this case. Consequently, Petitioner's first proposition is incorrect, both legally and

factually. The Sixth Circuit did not issue, even by subtle implication, the sweeping legal pronouncement that Petitioner attributes to it. Indeed, the Sixth Circuit's opinion could be read to suggest just the opposite conclusion: that the Court assumed, without the need to decide for purposes of its ruling in this case, that Grusenmeyer's drawings actually were entitled to full copyright protection.

The Petition asks this Court to "reject the Sixth Circuit's categorical rule in this case." (Pet. at 11). But, because the Sixth Circuit did not adopt any such "categorical rule" in this case in regard to copyright protection for architectural drawings of existing conditions, the Petitioner's first proposition of law should not be addressed by this Court. It is this Court's practice to decide cases only on the grounds and issues that were actually addressed by the court of appeals. See, e.g., *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426, 431 (2002). Whether Grusenmeyer's architectural drawings of the existing conditions on the Magnificat campus were or were not subject to copyright protection was never addressed by the Sixth Circuit. It need not and should not be addressed by this Court.

2. Try as Petitioner might to devise a "legal standard" that the Sixth Circuit transgressed, there is none. There is no legal standard that can be articulated or clarified by this Court in this case on the issue of whether architectural drawings of existing conditions are sufficiently original to merit copyright protection. The Petition acknowledges that "the

standard of analysis for determining originality in factual compilations" is already set forth in this Court's opinion in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). (Pet. at 8). While Petitioner may disagree with the District Court's conclusions based upon its application of the *Feist* standard to the precise drawings and facts – again the Sixth Circuit never addressed the issue – there is no reason for this Court to review such a fact-specific decision, particularly because it involves the application of settled legal standards. The Supreme Court's discretionary review does not extend to address merely the correctness of the judgment below. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974).

Petitions for writs of *certiorari* are not granted "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); see also *Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.); Sup. Ct. R. 10 (*certiorari* is "rarely granted when the asserted error consists of erroneous factual findings"). Yet the copyright issue in this case was decided by the District Court, again not by the Sixth Circuit, based precisely upon the specific facts and evidence in the record. (Pet. App. at 23a) ("After a thorough review of the relevant law, and the arguments and evidence set forth by the parties as to this issue, the Court finds that the drawings do not constitute copyrightable expression.").

3. While the Petitioner would like to have this Court believe that the Sixth Circuit's opinion conflicts with the Second Circuit's decision in *Sparaco v.*

Lawler, Matusky, Skelly Engineers, LLP, 303 F.3d 460 (2nd Cir. 2002), *cert. denied*, 538 U.S. 945 (2003), such is clearly not the case. Indeed, because the copyright issue was not addressed by the Sixth Circuit, its opinion here does not even cite to or discuss *Sparaco*. What Petitioner is complaining about is the District Court's application of *Sparaco*. (Pet. at 6-7). However, while this Court's rules allow for granting *certiorari* when two courts of appeals have made decisions in conflict with one another, that practice does not apply when a district court has arguably reached a conclusion at odds with a decision of another court of appeals. Sup. Ct. R. 10(a), see also, *C.I.R. v. Bosch's Estate*, 387 U.S. 456, 457 (1967).

While Petitioner seems to take issue with the fact that the Sixth Circuit did not expressly disavow the District Court's application of *Sparaco* – assuming there was reason to do so,[3] there is no indication that the Sixth Circuit failed to consider the arguments presented to it in this appeal merely because it did not issue a more comprehensive opinion. *Taylor v. McKeithen*, 407 U.S. 191, 194 (1972) (recognizing that "the courts of appeals should have wide latitude in their decisions of whether or how to write opinions.").

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[3] DS&C maintains, as it did in the courts below, that the *Sparaco* opinion actually supports the entry of summary judgment in its favor.

4. Petitioner also maintains that review is warranted here because the Sixth Circuit's determination that summary judgment was appropriately entered in favor of DS&C deviates from "a single uniform system" of copyright law and jeopardizes "uniform application" of the Copyright Act of 1976. (Pet. at 11, 13). This meritless argument must be rejected. It too is predicated upon the specious assertion that the Sixth Circuit has imposed a "categorical rule denying copyright protection to works expressly included in the copyright statute * * * ." (Pet. at 13). As established above, no such "categorical rule" has been recognized, espoused or hinted at by the Sixth Circuit's opinion in this case. Not even the District Court's opinion can be read to have adopted a "categorical rule" of such a nefarious impact as that suggested by Petitioner.

B. The Sixth Circuit's Disposition of this Case Based Solely Upon State Contract Law Principles Does Not Warrant Discretionary Review by this Court.

1. Petitioner's preemption argument (Pet. at 21-24), was never made in the courts below. This Court does not consider issues that are raised for the first time in the petition for *certiorari*. See, *United States v. Ortiz*, 422 U.S. 891, 898 (1975). Consequently, this case should not be accepted on the grounds that the Sixth Circuit's opinion on the contract issue is contrary to 17 U.S.C. §301(a). Even though the issue was

not properly raised by Petitioner before the District Court and the Sixth Circuit, there is no indication here that the Sixth Circuit did not "view all contracts involving copyrightable subject matter through the prism of the Copyright Act." (Pet. at 23).

2. Petitioner has never questioned whether the contract that Grusenmeyer had with Magnificat is unambiguous. The District Court expressly found that the parties' contract is unambiguous. (Pet. App. at 26a). In the Sixth Circuit, Petitioner argued that the contract documents were unambiguous. According to the plain language of the contract, Grusenmeyer was to prepare a Master Plan "'for the implementation of the capital improvements program, including plans, renderings and perspectives suitable for use in the presentation and future reference during master plan implementation.'" (Pet. App. at 26a). As provided in the contract, the program for capital improvements included the building of a Fine Arts/Band Practice/Auditorium type space. It has never been disputed that Grusenmeyer provided Magnificat with existing conditions drawings, and that those drawings were used by DS&C in connection with the development of the Performing Arts Center at Magnificat. As such, the existing conditions drawings fall within the scope of Grusenmeyer's responsibilities under the contract, for which Magnificat paid approximately $15,000. (Pet. App. at 26a-27a).

Based upon these facts and evidence in the record, the District Court determined that

> It is consistent with logic that drawings of existing conditions would be necessary for the implementation of the capital improvements program and would therefore be included within [Grusenmeyer's] responsibilities under the contract. Equally logical is the fact that such drawings may be used in the implementation, in return for the compensation that Magnificat paid to [Grusenmeyer].

(Pet. App. at 27a). The Sixth Circuit agreed:

> We agree with the district court's conclusion that, contrary to [Grusenmeyer's] assertions, the contract permits the use, as described, of the materials developed under it. Otherwise, the contract provision stating that Grusenmeyer would "[p]rovide . . . plans, renderings, and perspectives suitable for use and future reference during master plan implementation" would be meaningless.

(Pet. App. at 13a).

3. Petitioner's imagined and hyperbolic dilemma said to be facing architects, surveyors, mapmakers and other technical artists should the Sixth Circuit opinion be allowed to stand is mere sophistry. (Pet. at 26-30). The Sixth Circuit decision affirming summary judgment does not "cast[] doubt on the independent legal significance of the American Institute of Architects' standard contract documents to

prevent transfer of an architect's copyright interests." (Pet. at 29). The AIA form contract actually supports the summary judgment here. As the Sixth Circuit's opinion clearly noted, the outcome in this case was predicated upon the unique fact that Grusenmeyer had prepared his own written contract – i.e., the two-page letter agreement – wherein permission was given for the use of the materials developed by Grusenmeyer as part of the Master Plan for the implementation of the capital improvements program at Magnificat. (Pet. App. at 12a-13a). Petitioner's argument, repeated here (Pet. at 25), that this permission extended only to Magnificat and not professionals, like DS&C, who were hired to implement the Master Plan was found by the Sixth Circuit to "border[] on the absurd." (Pet. App. at 13a).

Magnificat paid Grusenmeyer approximately $15,000 to prepare, in part, an existing condition plan. The contract provided, in relevant part: "3. Provide a master plan for the implementation of the capital improvements program, including plans, renderings and perspectives suitable *for use in the presentation and future reference during master plan implementation.*" (Pet. App. at 7a) (emphasis sic). This was contained in the two-page letter agreement prepared by Grusenmeyer – a writing separate and apart from the AIA Abbreviated Form Agreement.

Article 6.1 of the AIA Abbreviated Form Agreement, which was purportedly incorporated by reference in the Grusenmeyer-Magnificat contract, grants permission for use of the drawings. This section

provides that the drawings prepared by the architect can be utilized on other drawings if agreed to in writing and if the architect is compensated. As set forth in the preceding paragraph, Grusenmeyer and Magnificat did agree that the plans prepared by Grusenmeyer could be utilized for future reference during the Master Plan implementation and Grusenmeyer was, in fact, compensated accordingly. None of the cases cited by Petitioner have facts analogous to this case. Indeed, the Sixth Circuit rejected Grusenmeyer's insistence that the Circuit's opinion in *Johnson v. Jones*, 149 F.3d 494 (6th Cir. 1998) mandates a reversal of the District Court's order, "because we conclude that the facts in that case are fundamentally distinct from those now before us." (Pet. App. at 14a).

II. THIS CASE IS NOT A PROPER VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Finally, and quite apart from the Petition's failure to satisfy the criteria of Rule 10, review is also unwarranted because this case is an exceptionally poor vehicle to resolve any question presented. Despite the recent enactment of Fed. R. App. P. 32.1(a),[4] only "[r]eported panel opinions are binding

[4] See also, 6 Cir. R. 28(g), which reads in its entirety as follows:

> (g) Citation of Unpublished Decisions. Citation of unpublished opinions is permitted. FRAP 32.1(b) applies to all such citations.

on subsequent panels" in the Sixth Circuit. 6 Cir. R. 206(c). See also, *Bell v. Johnson*, 308 F.3d 594, 611 n. 7 (6th Cir. 2002). It has not been the ordinary practice of this Court to grant *certiorari* when a decision sought to be reviewed is unpublished, and there is no compelling reason to do otherwise here. There is no cause for this Court to expend its limited resources in hearing an appeal of this nature or in resolving a purported conflict when "even the court that rendered the decision may reach a different conclusion in the next case presenting the issue." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE §6.37(c), at 459 (8th ed. 2002); see, e.g., *Aerel, S.R.L. v. PCC Airfoils, L.L.C.*, 448 F.3d 899, 907 (6th Cir. 2006) (Sixth Circuit refused to recognize two unreported opinions as the rule purportedly adopted by "these nonprecedential opinions is unwarranted.").

The decision below faithfully applied relevant precedent, and Petitioner, at best, merely asks the Court to examine whether the District Court and Sixth Circuit correctly applied settled law. Petitioner may quarrel with how the courts applied the law to the facts of the case, but that is not the sort of "error" worthy of a grant of *certiorari*. Sup. Ct. R. 10. There is no reason why this Court should review a fact-specific ruling that in no way conflicts with the decisions of this Court or other courts of appeals.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Wherefore, the Petition for a Writ of *Certiorari* should be denied and the Sixth Circuit opinion allowed to stand.

Respectfully submitted,

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